

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 201

**BUCKSTAFF BATH HOUSE COMPANY,
PETITIONER,**

vs.

**ED I. McKINLEY, AS COMMISSIONER OF THE
DEPARTMENT OF LABOR OF THE STATE OF
ARKANSAS, ET AL.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ARKANSAS.**

PETITION FOR CERTIORARI FILED JULY 14, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 201

BUCKSTAFF BATH HOUSE COMPANY,
PETITIONER,

vs.

ED I. MCKINLEY, AS COMMISSIONER OF THE
DEPARTMENT OF LABOR OF THE STATE OF
ARKANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ARKANSAS

INDEX.

Original Print

Proceedings in Supreme Court of Arkansas	1	1
Caption (omitted in printing) ..	1	
Record from Chancery Court of Pulaski County	2	1
Caption (omitted in printing) ..	2	
Complaint	3	1
Exhibit "A-1"—Agreement between John H. Edwards and Buckstaff Company, August 5, 1931	7	3
Demurrer	16	10
Order sustaining demurrer	17	10
Clerk's certificate (omitted in printing) ..	18	
Judgment	19	11
Opinion of court, Griffin Smith, J.	20	11
Petition for rehearing	31	20
Order overruling petition for rehearing	32	21
Stipulation omitting portions of record	33	21
Clerk's certificates (omitted in printing) ..	34	
Petition for appeal	36	22
Order allowing appeal	38	24
Assignments of error and prayer for reversal	40	24
Bond on appeal (omitted in printing) ..	43	
Citation and service (omitted in printing) ..	45	
Præcipe for transcript of record	46	26
Certificate of lodgment (omitted in printing) ..	48	
Statement of points to be relied upon and designation as to record	49	28
Order allowing certiorari	50	28

[fols. 1-2]

[Captions omitted]

[fol. 3]

IN CHANCERY COURT OF PULASKI COUNTY

No. 57,652

BUCKSTAFF BATH HOUSE COMPANY, Plaintiff,

v.

ED I. MCKINLEY, as Commissioner of the Department of Labor of the State of Arkansas, and

W. A. ROOKSBERRY, as Director of the Division of the Unemployment Compensation of the Department of Labor of the State of Arkansas, Defendants

COMPLAINT—Filed Aug. 19, 1938

Plaintiff for cause of action says that it is a corporation, organized under the laws of the State of Arkansas, with its only place of business situated on the United States Government Reservation in Garland County, Arkansas, known as Hot Springs National Park, and that the Defendants, Ed I. McKinley and W. A. Rooksberry, are the Commissioner and Director respectively of the Department of Labor of the State of Arkansas, charged with the duty of the enforcement of Act #155 of the General Assembly of Arkansas for 1937, commonly known as the Unemployment Compensation Bill.

Plaintiff says that during the period beginning on the first day of January, 1937, and ending on the thirty-first day of December, 1937, it had in its employ fifteen persons engaged in performing services in the operation of said bath house, for which Plaintiff became liable as an employer and paid the aggregate sum of \$9,029.80. That during said period, fifteen attendants performed services at its bath house, who received in the aggregate the sum of \$9,445.55, in the manner and according to the terms of the rules and regulations promulgated by the United States Department of the Interior hereinafter referred to; and that during said period, nine people performed services in the massage department, receiving in the aggregate the sum of \$4,885.44, in accordance with said rules and regulations of the Department of the Interior.

[fol. 4] Plaintiff says that the Hot Springs National Park in Garland County, Arkansas, adjacent to the City of Hot Springs, is a United States Government Reservation, and that no jurisdictional supervision, regulation or control has been surrendered to the State of Arkansas, and that the property embraced in said Reservation has at all times heretofore been in the ownership of the United States, but that the consent of the United States was given to the State of Arkansas to tax under the laws of the State of Arkansas applicable to equal taxation of personal property in this State, as personal property, all structures and other property in private ownership on the Reservation.

Plaintiff says that at its expense it erected a bath house equipped and according to the specifications approved by the Secretary of the United States Department of the Interior within the boundaries of said Reservation, and that it operates the same under a lease entered into on the fifth day of August, 1931, with the United States of America, a copy which is hereto attached, marked "Exhibit A-1" and made a part hereof, which said lease corresponds to the general policy of the United States Department of the Interior covering the regulation and distribution of the waters of said Reservation, and its use, as evidenced by a copy of the lease of Superior Bath House and of Quapaw Bath House, hereto attached, marked "Exhibit A-2" and "Exhibit A-3" respectively and made a part hereof.

That its lease and all other leases of bath house privileges on said Reservation are made in accordance with the Acts of Congress relating to said Reservation and the regulations promulgated by the United States Department of the Interior, a copy of said regulations being attached hereto, marked "Exhibit B" and made a part hereof.

Plaintiff says that its only business is that of furnishing baths in accordance with said lease and the regulations [fol. 5] of the United States Department of the Interior, all of which operations are conducted on and within the boundaries of said Reservation, and that it maintains no office or agency, nor does it perform any service of any character at any place beyond the boundaries of said Reservation.

Plaintiff says that it is an instrumentality of the United States in the use, distribution and conservation of the medicinal waters of said Reservation to the extent set out in the Acts of Congress relating to said Reservation, the leases

hereto attached, and the regulations of the United States Department of the Interior; and that as such, it is exempt from the contributions for employment specified in Act #155 of the General Assembly of Arkansas for 1937; and that the compensations for services performed by attendants and massagers does not constitute employment or wages within the meaning of said Act.

Plaintiff says that its operators and its properties on said Reservation are exempt from taxation, regulation or control by the Acts of Congress and the Acts of the General Assembly of the State of Arkansas relating to said Hot Springs National Park Reservation.

Plaintiff says that the attempted collection of said contribution violates Article 4, Section 3, Constitution of the United States.

That the employees, bath house attendants and massage operators above mentioned are residents of the State of Arkansas and that unemployment compensation for the year 1937 has been paid to the United States for their salaries, wages and commissions.

Plaintiff says that the Defendants in their official capacities, under the said Act #155 of the General Assembly of the State of Arkansas for 1937, have assessed against it a tax contribution on the amounts paid to employees and earnings by attendants and massagers for the fiscal year of 1937 as above set out at the rate of 1.8% per annum, and are threatening to levy upon and sell Plaintiff's property for said assessment, contrary to law, and that said [fol. 6] levy and sale will irreparably damage Plaintiff, for which it has no complete and adequate remedy at law.

Wherefore, Plaintiff prays that the Defendants be restrained from levying and collecting said assessment contributions from it, and for all other proper relief.

E. R. Parham, Solicitor for Plaintiff.

[fol. 7] EXHIBIT "A-1" TO COMPLAINT

This Agreement made and entered into this 5th day of August, 1931, by and between John H. Edwards, Assistant Secretary of the Interior, acting for and in behalf of the United States of America, party of the first part, and hereinafter referred to as the Secretary, and the Buckstaff Bath House Company, a corporation organized and existing under the laws of the State of Arkansas, its successors and as-

signs, party of the second part, hereinafter referred to as the Operator.

Witnesseth: That pursuant to the provisions of a joint resolution of Congress, approved March 26, 1888 (25 Stat. 619), entitled "Joint Resolution to enable the Secretary of the Interior to utilize the Hot Water running to waste on the permanent reservation at Hot Springs, Arkansas, and for other purposes", and an Act of Congress approved March 3, 1891, (26 Stat. 842) entitled "An Act to regulate the granting of leases at Hot Springs, Arkansas and for other purposes", the parties hereto have mutually agreed and by these presents do mutually agree to and with each other as follows:

I. In Consideration of the rents, covenants and stipulations hereinafter mentioned, reserved and contained, the Secretary hereby grants leases unto the operator company the plot of ground in the Hot Springs National Park, Arkansas on which is located the Buckstaff Bath House, more particularly described as follows: Bath House Site No. 3 on plans submitted to the Department of the Interior on May 12, 1891, by the Superintendent of the Reservation, commencing at Station 2 and 10 feet on the building line, running thence Northerly along said building line a distance of 100 feet to Station 3 and 10 feet; then Easterly at right angles to building line 102.1 feet; thence Southerly 100.1 feet; thence Westerly at right angles to the building line 108 feet to the place of beginning.

II. To Have and to Hold for the term of twenty (20) years, commencing on the thirty first day of January, 1932, and ending on the thirty-first day of December, 1951; together with the use of the hot waters from the Hot Springs National Park, for the purposes and only upon the terms and conditions herein mentioned; subject to the provisions of all existing laws of the United States and of such laws as may hereafter be enacted by Congress relating to, about or concerning the Hot Springs National Park, or the waters thereon, and the rules and regulations that have been, or may hereafter be, made and established by the Secretary of the Interior pursuant to any such acts of Congress, which are accepted and made a part hereof in the same manner and to the same effect as if such acts or rules and regulations, or their several provisions, were specifically set forth herein.

III. In Consideration Whereof, the Operator Company agrees to maintain and operate a bath house on said site with thirty (30) bath tubs and all necessary appliances for providing baths to the public and to pay the Secretary rental at the rate of eighty dollars (\$80.00) per tub per annum for each and every bath tub allowed in said bath house, and whether erected or used or not, to be paid in advance in quarterly installments at the office of the superintendent of the park, subject to such changes as to rate as by law may be established and subject to the right of the Secretary, hereby reserved and acknowledged, to readjust and increase the amount of rent herein provided for to such sum per tub as he may deem just whenever during the continuance of this lease it may become necessary, and to meter the hot water and adjust the rate of rental on the basis of the actual amount of hot water furnished, whenever and if during the continuance of this lease such action may be deemed necessary for the conservation of the available supply of Hot Water; provided. That the Secretary may fix the rate of charges for baths in said bath house, including the services of attendants, which rate of charges shall be kept continuously and conspicuously posted in the bath house by the Company (operator); and the Company (operator) shall in no event charge in excess of such rates for baths therein, or enter into any combination with the leasees of other bath houses on or near the Hot Springs National Park to fix the prices [fol. 9] in violation of or different from the rates thus fixed. The number of tubs let may, in the discretion of the Secretary, be diminished or increased within the limit authorized by law, commencing from the first day of July in any year during the continuance of this lease, either upon his own motion or upon the written application of the Company (operator) to him to make such change, and rent shall then be paid for the number of tubs allowed; but there shall be no obligation on the part of the Secretary to supply hot water from the springs *from the springs* or reservoirs if at any time, in the judgment of the Secretary, said water shall not be sufficient; and for failure to furnish water in any case there shall be no claim or demand of any kind against the United States or the Secretary.

IV. And the Company (operator) agrees to keep and maintain the said bath house and premises continuously in complete repair and good order, with a sufficient number of

courteous and skilled attendants and servants, and further, in all particulars, as a first class bath house, and shall keep the furniture, furnishings, and appointments in first class condition and refit the same whenever in the judgment of the Secretary the circumstances require it. All decayed or wooden parts shall be replaced with iron, stone, or concrete, where practicable, so as to keep the building practically fire-proof, all work to be done to the satisfaction of the Secretary. In case the bath house now on the leased premises be destroyed by fire, or otherwise, during the term of this lease, the Company (operator) shall replace it with a building constructed of fire-proof material upon plans and specifications approved by the Secretary.

V. The Company (operator) shall, at its own expense, securely and adequately, with the best material, wall, curb, and cement the bottoms and sides and cover over all hot water springs now on said site, or which may be developed on the same by an excavations made thereon, and securely pipe the same to the exterior limits thereof, connect the same in such manner and at such point or points as the superintendent of the park may designate, for utilization at receiving reservoirs or pumping stations or otherwise; and [fol. 10] construct and maintain ways of access to all such springs at all times available to the superintendent or any agent of the Secretary; also keep the grounds and walks attached thereto or used in connection with said bath house in a clean condition and free from litter and rubbish, to the satisfaction of the superintendent. The Company (operator) shall also provide and maintain at its own expense, ample and safe sewerage and drainage, with all necessary appliances, conducted on the best principle to secure sanitary conditions, and particularly to protect from contamination all springs situated on said site, and keep the same in such condition, to the satisfaction of the superintendent.

VI. All blasting on said site and all excavations upon the same shall be made only upon permission and by direction of the superintendent; and nothing herein contained shall be construed as a grant unto the Company (operator) of any exclusive right either to the waters of any spring that may be upon the land hereby leased, or elsewhere, nor to bore for water upon said lands, nor any exclusive right to any thing whatever save the possession of the premises hereby leased, nor as a grant to appropriate or use the

premises or any part thereof otherwise or to any degree than as herein set forth, nor to devote said building in whole or in part to any other purpose than herein expressed, or willfully permit the waste or use of the hot water for other than bathing or drinking purposes. The superintendent of the park or other authorized agent or representative of the secretary shall at any time have access to said bath house and premises, and every part thereof, for purposes of inspection.

VII. The Company (operator), or its successors, or assigns, shall not during the life of this lease be interested, as leasee, assignee, owner, director, manager or otherwise, in any other bath house, bath house interest, or hot water privilege, at or near Hot Springs, or a stockholder in any corporation so interested; and it will not enter into any combination or pool with any other party so interested to share any profits or losses of bath house business, or share any [fol. 11] rates or charges or of accommodations to be furnished or of other management of this or other bath house at or near Hot Springs, Arkansas.

VIII. The Company (operator) will not employ any agents or drummers to solicit patronage for said bath house, nor pay, nor cause to be paid, directly or indirectly, any drummer or agent for any such solicitation, nor permit the same to be done by any agent, servant, attendant, employee or rubber employed in or about said bath house, or permitted to work therein, any violation of this provision shall cause the immediate forfeiture of this lease; and the Company (operator) shall, when required by the Secretary, render to him during the life of this lease a monthly statement of the receipts and expenditures of said bath house, together with a statement of the number of baths daily administered therein, attested by the affidavit of the manager in charge.

IX. Neither this lease nor any interest therein shall be assigned, transferred or sublet by the Company (operator) to any person or persons, corporation or corporations, unless such assignment be first approved in writing by the Secretary, and any such attempted assignment or transfer without such approval shall not only be entirely void, but such act of attempted assignment unless approved, shall, of itself, cause the immediate forfeiture of this lease the

same, in all particulars and results, as if the terms hereof had expired absolutely by limitation; all rights of action however, being reserved to the United States for any breach of this contract by the Company (operator).

X. It is agreed that in case of default or payment of rent as herein stipulated, or if the Company (operator) shall fail to keep and observe any and all covenants hereof, or if it violates any of the regulations or any of the provisions of the statutes relating to the Hot Springs National Park, then and — either event, after the presentation of the facts and due recommendation by the Superintendent of the Hot Springs National Park to the Director of the National [fol. 12] Park Service the latter shall, with the approval of the Secretary, withhold the use of the hot water for a period of thirty days, during which period the Company (operator) shall have the opportunity to appeal to the Secretary for a further review of the matter and if at the expiration of the period of thirty days and the conclusion of the further review, the Secretary still approves of the recommendations of the Superintendent of the Park, then this lease and all rights or privileges herein shall be forfeited at the option of the Secretary, and the terms hereof ended, and the said premises may be taken possession of on behalf of the United States in the same manner as if the full term of the lease had expired, except as hereinafter provided, but there shall be ten days notice to the Company (operator) hereof by service upon its representatives or placed conspicuously on the premises.

XI. It is further agreed that if, on the expiration of this lease by limitation of time, the premises shall be leased to some one other than the Company (operator), the latter shall be given the opportunity to be reimbursed for the reasonable value of its buildings, fixtures, stock, equipment and other property thereon as the Secretary may, by an inspection made within six months prior to such termination, determine to be appropriate for use on said premises and in enhancement of the value thereof for the purpose of conducting a bath house. The value of such property shall then be ascertained by a board of three appraisers appointed as follows: at least ninety days before the expiration of this lease, the Secretary and the Company (operator) shall choose one appraiser, and the two selected

shall then choose a third. If they do not within thirty days of their designation agree upon a third appraiser, then the Secretary shall select such third appraiser. The salary and expenses of the third appraiser shall be paid by the Company (operator). This board, or a majority thereof, shall within thirty days from the designation of the third member, and after an inspection of the property to be appraised and the taking of such testimony as may be adduced by the [fol. 13] parties in interest, report their findings to the Secretary, who may approve, set aside, or modify the same, or order a new appraisal as he may see fit.

The value of such buildings and property when determined by the Secretary, whose decision in the premises shall be final, shall be paid at the time and in the manner directed by him, to the Company (operator) hereunder by the person, company, corporation or association to whom the premises are to be leased; Provided, that nothing shall be construed as creating a claim against the United States, or shall prevent the Secretary from leasing or subletting said property and the improvements thereon in such manner and upon such terms as may be necessary for the full protection of the interests of the Government, or shall delay the surrender of the premises with all the buildings, fixtures and appurtenances thereon upon any termination of this contract, or shall in any manner charge the Government for the use of such buildings or other property.

XII. It is hereby distinctly understood that no exclusive privileges are, or are intended to be, created by this lease, but the same are hereby prohibited; and the terms hereof shall be so construed as to carry this understanding and agreement in this particular into complete effect.

XIII. No member of or delegate to Congress, or resident Commissioner, or officer or employee of the Department of the Interior, is or shall be admitted to any share or part in this agreement, or derive any benefit which may arise therefrom, and the provisions of Section 3741 of the revised Statutes of the United States, and Sections 114, 115 and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909 (35 Stat. 1100), relating to contracts, enter into and form a part of this agreement, so far as they may be applicable.

In Witness Whereof the parties hereto have caused these presents to be executed and their seals affixed the day and the year above written.

[fol. 14] John H. Edwards, Assistant Secretary of the Interior. McD. Buckstaff Bath House Company, by A. H. Buckstaff, President. Attest: G. E. Hogaboom, Secretary.

[fol. 15] [File endorsement omitted.]

[fol. 16] IN CHANCERY COURT OF PULASKI COUNTY

[Title omitted]

DEMURRER—Filed Nov. 1, 1938

Come the Defendants and demur to the Complaint and for grounds, state:

Said Complaint does not contain allegations sufficient to constitute a cause of action against the Defendants.

Said Complaint shows on its face that the Plaintiff is not entitled to the relief prayed for, or any relief whatsoever.

Walter L. Pope, Solicitor for Defendants.

[File endorsement omitted.]

[fol. 17] IN CHANCERY COURT OF PULASKI COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER

On this day comes on to be heard the above entitled cause and the same being submitted to the Court for its consideration and judgment on the Complaint of the Plaintiff, together with its exhibits, the Demurrer of the Defendants and the argument of Counsel, and the Court, being well and sufficiently advised as to all matters of law and fact and the premises being fully seen, doth order, adjudge and decree that said Demurrer be sustained, and the Plaintiff, electing to stand on its Complaint, the same is dis-

missed, to which action the Plaintiff objects and prays an appeal to the Supreme Court, which is hereby granted.

November 9, 1938.

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] IN SUPREME COURT OF ARKANSAS.

5435

Appeal from Pulaski Chancery Court.

BUCKSTAFF BATH HOUSE COMPANY, Appellant,

v.

ED I. MCKINLEY, Commissioner of Labor, et al., Appellees

JUDGMENT—April 10, 1939

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County and was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellant all their costs in this court in this cause expended, and have execution thereof.

[fol. 20] IN SUPREME COURT OF ARKANSAS

No. 5435

BUCKSTAFF BATH HOUSE COMPANY, Appellant,

v.

ED I. MCKINLEY, Commissioner, et al., Appellees

OPINION—April 10, 1939

GRIFFIN SMITH, C. J.

Appellant denies it is subject to the provisions of Act No. 155, approved February 26, 1937,¹ and refused to pay

¹ Pope's Digest, secs. 8549 to 8569.

the tax alleged by appellees to be due for the 1937 calendar year.

Injunctive relief was sought to prevent E. I. McKinley, as Commissioner of the Department of Labor, and W. A. Rooksberry, as Director of the Division of Unemployment Compensation of the [Arkansas] Department of Labor, from levying and collecting assessments provided for by the Act. Appellant insists that, although it is an Arkansas corporation, its place of business is within the United States Government Reservation at Hot Springs, in Garland County. It admits that during the period in question it had in its employ fifteen persons engaged in performing services in the operation of its bathhouse "• • • for which plaintiff became liable as an employer and paid the aggregate sum of \$9,029.80." During the same period fifteen attendants "• • • performed services at [plaintiff's] bathhouse, who received the aggregate sum of \$9,445.55 in the manner and according to the terms of the rules and regulations promulgated by the United States Department of the Interior, • • • and that during said period nine people performed services in the massage department, receiving in [fol. 21] the aggregate the sum of \$4,885.44, in accordance with rules and regulations of the Department of the Interior."

Appellant's first position is that because of its situation within the boundaries of a government reservation, jurisdictional supervision, regulation, control, etc., have not been surrendered to the State of Arkansas to an extent permitting assessment of the unemployment tax, notwithstanding that consent of the United States was given the State to tax, as personal property, all structures and other personal property in private ownership within the Reservation.

Appellant, at its own expense, erected a bathhouse and equipped it according to specifications approved by the Secretary of the Interior. It operates the business under a lease executed in 1931.

Secondly, appellant says that it is an instrumentality of the United States Government, engaged in the distribution and conservation of medicinal waters of the Reservation to the extent authorized by acts of Congress relating thereto and rules of the Department of the Interior, and that as such instrumentality it is exempt from the contributions specified in Act 155 of the Arkansas General Assembly; that "• • • compensation for services performed by attendants and

massagers does not constitute employment or wages within the meaning of said Act."

It is further urged that collection of the tax or contribution would be violative of Art. 4, sec. 3, of the Constitution of the United States.

Department of the Interior regulations for bathhouses, made a part of contracts under which waters of the Reservation are allocated, show a retention by the Department of certain elements of control.²

We must first determine whether collection of the tax laid by Act 155 is a legitimate exercise of the State's governmental functions.

² Regulations of the Department of the Interior provide that bathhouses shall be allowed such number of tubs as the Secretary of the Interior may deem necessary for the public service. Charges shall be fixed by the Secretary. Tickets shall be sold at specified rates and only to persons intending to use them for bathing. Tickets are redeemable according to a scale fixed by the Department of the Interior. No complimentary tickets may be issued, nor any sale of bath equipment on the premises. No person shall be allowed to bathe without a ticket registered in the office of the Superintendent [of the Reservation]. The rate of charges for massages and tickets are fixed at varying amounts, providing for that portion of the ticket [or interest therein] which shall belong to the attendant or masseur. All attendants, masseurs, etc., are required to undergo physical examination. Drumming and soliciting are prohibited. Regulations as to the use and sale of bath mitts, towels, sheets, blankets, etc., are included. Approval of the Superintendent required for the employment of any person in the bathhouses of Hot Springs National Park. Bath attendants prohibited from performing their work on the premises without having passed a written examination, a physical examination, and without paying their privilege fee to the Department. They may charge for their services not exceeding 20 cents for a single bath, and \$4 for a course of baths. Superintendent authorized to collect a fee of \$6 for examination of bath attendants. Masseurs similarly regulated. Bathhouse required to furnish the Superintendent with daily and monthly reports of activities. No stock in an incorporated bathhouse may be transferred without consent of the Director of the National Park Service.

Having found that "Economic insecurity due to unemployment [fol. 22] is a serious menace to the health, morals, and welfare of the people of the State," and that "Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action," it was the General Assembly's considered judgment that "• • • the public good, and the general welfare of the citizens of this State require the enactment of [the Unemployment Compensation Law] under the police power of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

An excise tax is levied on wages paid to employees, to be paid by the employer at the rate of 1.8% for 1937, and 2.7% after December 31, 1937. Future rates are to be based on benefit experience.

The National Social Security Act,^a Title IX, levies a tax on every employer (with stated exceptions) of eight or more. Payments covering the 1936 calendar year were 1%, due January 1, 1937. For 1937 the rate was 2%; and 3% thereafter. The term "employment" excludes agricultural labor, domestic services in private homes, and other small classes.

Allowable credits are provided by Sec. 1102. Against the tax so imposed, the amount of contributions (with respect to employment during the taxable year paid by such taxpayer into any unemployment fund under a state law having the approval of the National Social Security Board) not to exceed 90%, may be deducted by the taxpayer.

Effect of these provisions is this: The Arkansas rate for 1937, being 1.8%, and the Federal rate being 2%, the taxpayer in reporting to the Federal Government took credit for the payment made to the State, and remitted two tenths of one per cent to Washington. For 1938 credit was taken for 2.7%, and three tenths of one per cent was sent to the Federal treasury.

All remittances on pay rolls involving less than eight persons, made directly to the Unemployment Compensation [fol. 23] Division of the Arkansas Department of Labor, go into the treasury at Washington and earn 3% interest. Remittances on pay rolls of eight or more covering the tax assessed by Act 155, although made to the State Unemploy-

^a Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7 (Supp).

ment Division, are likewise sent to the National Treasury and become a trust fund for the benefit of employees within the classification of eight or more. If there be no state unemployment compensation law of a character meeting approval of the National Social Security Board, the full amount levied under Title IX is collected by the Federal Bureau of Internal Revenue⁴ and is deposited generally in the U. S. Treasury without credit to the state wherein the collection is made.

Appellant admits it was liable to the United States for unemployment compensation tax levied under Title IX of the Social Security Act,⁴ and that such tax has been paid.

The three questions for determination are:

(1) Did the Federal Government authorize the State to assess and collect taxes of the character herein discussed?

(2) Is appellant a governmental instrumentality or agency, and therefore excused?

(3) Are appellant's employees independent contractors?

By Act of March 3, 1891,⁵ the Congress of the United States extended the Federal Government's consent "... for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property [of] all structures and other property in private ownership on the Hot Springs Reservation."

Ex Parte Gaines,⁶ decided more than a year after Congress had extended the authority just referred to, declared the law to be: "When the Government parts with its title, or any interest therein, the property or interest which the Government parts with becomes subject to taxation. When it makes a lease to an individual of any interest or privilege in its lands within the Reservation, the interest of the lessee, [fol. 24] whatever it may be, may be taxed, subject however to all the rights and interests which the United States retains in the property * * * The interest of the lessee in the land is not the property of the United States, and it is

⁴ U. S. Code Annotated, Title 42—The Public Health and Welfare.

⁵—U. S. C. Annotated, p. 365.

⁶ 56 Ark. 227, 19 S. W. 606. Opinion dated May 21, 1892.

not a means employed by the Government to obtain a government end. The power to tax that interest does not involve, therefore, the power to destroy or disturb any interest of the United States Government."⁷

The tax laid by Act 155 is not a tax on personal property; nor is it, in any sense, a property tax. But the Congress seemingly intended (and this construction is strengthened by the Gaines Case) to permit the State to exercise its sovereignty within the Reservation with respect to the conduct of business, commerce, and the professions, subject only to the interest retained by the Government and the right to enforce restrictions under the Federal laws and under rules promulgated by the Interior Department.

Lands were leased, and individuals, corporations, partnerships, etc., were permitted to erect buildings and to engage in activities for profit and amusement. Healing properties of the medicinal waters were recognized, and the use of such waters was circumscribed in order that opportunity might be afforded the public to enjoy the benefits.

But the Government, per se, did not engage in the business of operating appellant's bathhouse. On the contrary, it leased the site and fixed the fees to be charged by operators. The extent to which such regulations were carried is shown in the second footnote to this opinion.

Constitutionality of the National Social Security Act was assailed in *Stewart Machine Company v. Davis*.⁸ The controversy reached the Supreme Court of the United States, where in an opinion written by Mr. Justice Cardozo⁹ it was

⁷ *The Little Rock & Fort Smith Ry. v. R. W. Worthen, Collector, Etc., et al.*, 46 Ark. 312. See third headnote. This case is cited in *Ex parte Gaines*.

⁸ 301 U. S. 548. Petitioner was an Alabama corporation. It paid its tax of \$46.14 and filed a refund claim with the Commissioner of Internal Revenue, and sued to recover, asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant, dismissing the complaint. The Circuit Court of Appeals for the Fifth Circuit affirmed. 89 F. 2d 207. Certiorari was granted.

⁹ Mr. Justice Cardozo, in the *Steward Machine Company-Davis* case, stated that the decision of the Court of Appeals was in accord with judgments of the Supreme Judicial Court of Massachusetts, the Supreme Court of California, and the

said: "The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of employment."

*Carmichael v. Southern Coal Company*¹⁰ is another case [fol. 25] in point. The opinion, written by Mr. Justice Stone, contains the following statements:

"This court has long and consistently recognized that the public purpose of a state, for which it may raise funds for taxation, embrace expenditures for its general welfare The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals."

Although constitutionality of the Arkansas statute is not directly questioned in the appeal before us, this is the first case reaching this court in which payment of the tax is involved. Necessarily if we hold that appellant must pay the State's demand, we have upheld the validity of Act 155. For this reason the decisions quoted from have been cited.

The Legislature had the right to require that employers make contributions in the manner provided by Act 155. The National Social Security Act denominates the contribution "an excise tax levied on employers." That the required payment is referred to in our Act 155 as a "contribution," is of no significance. It is a compulsory contribution, and therefore a tax.

In its original sense an excise was something cut off from the price paid on a sale of goods, as a contribution to the

Supreme Court of Alabama. It was in conflict with a judgment of the Circuit Court of Appeals for the First Circuit, from which one judge dissented. (See page 573, 301 U. S.).

¹⁰ 301 U. S. 495, 57 S. Ct. 568. (The Arkansas Unemployment Compensation Law is said to be almost identical with the Alabama Law).

support of the government. In its broader meaning it now seems to include every form of taxation which is not a burden laid directly upon persons or property—every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.¹¹

[fol. 26] In *State v. Handlin*¹² it was said [with respect to the inheritance Act of May 17, 1907]: "We . . . hold that the tax provided by this Act upon the privilege of succeeding to inheritances and estates was well within the power of the Legislature to impose, being included within its express powers to 'tax privileges in such manner as may be deemed proper.'"

Quoting from Judge Cooléy,¹³ Chief Justice McCulloch said: "Everything to which the legislative power extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall at any time select it for revenue purposes."

Individuals, firms, and corporations engaged in business are privileged to do so because of the protection extended by government. Enforcement of contracts generally is a matter of constant judicial address. The State's welfare is best served when those of its citizens who must labor are able to find employment at profitable wages and in healthful surroundings. The contribution exacted by Act 155 becomes cumulative for use when the worker finds himself industrially adrift. His misfortune is not one affecting the individual alone. It extends to the entire community. If unemployment cannot be avoided, at least its tragic conse-

¹¹ Ballentine's Law Dictionary, pp. 460-461. "An interesting review of the authorities discussing the meaning of the word 'excise' will be found in Mr. Justice Brewer's opinion in *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. (U. S.) 713, 22 S. Ct. 493."

¹² 100 Ark. 175, 139 S. W. 1112.

¹³ *Ex Parte Byles*, 93 Ark. 612, 126 S. W. 94; 37 L. R. A., NS 774, error dismissed, 1912, 32 S. Ct. 836, 225 U. S. 717, 56 L. Ed. 1270.

quences can be ameliorated. Such is the purpose of the statute in question.

In the instant case, if it be urged that the tax is laid against the privilege of paying employees, or upon the right of an employer to engage labor (and therefore unrelated to personal property as appellant insists and beyond the grant of authority expressed in the Act of 1891, and not to be reasonably implied from the nature of the grant), the answer is that the Federal Government has enacted a similar tax; and appellant, having more than eight employees, comes within the classification from which unemployment [fols. 27-30] compensation is exacted. We are asked to say that the Congress has not conferred upon Arkansas the right to impose the excise in question, while at the same time the National Social Security Act imposes a similar tax on employers in each of the forty-eight states. Conceding, as we must, that authority of the State to collect the tax does not come from the Social Security Act of Congress, yet the power conferred by Act of 1891 to tax personal property impliedly carried with it the right to tax the use of such property to the same extent and in manner similar to property not within the Reservation.

It is next insisted by appellant that it possesses all of the characteristics necessary to classification as a governmental agency or instrumentality, and, as such, is exempt from the tax.

The rule announced in *Cooley on Taxation*¹⁴ is that "A corporation cannot escape state taxation merely because it

¹⁴ Fourth Edition, v. 2, p. 1300. See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375; *Fidelity & Deposit Company v. Pennsylvania*, 240 U. S. 319; *James v. Dravo Constructing Company*, 302 U. S. 34; *Union Pacific Railroad Company v. Peniston*, 18 Wa. 5, 21 L. Ed. 787; *Trinityfarm Construction Company v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469-70, 78 L. Ed. 918.

Mr. Justice Stone of the Supreme Court of the United States has excellently reviewed the subject of immunity of Federal agencies and instrumentalities from state taxation. See *Mark Graves, et als., Commissioners, v. People of the State of New York, etc.*, Law Edition Advance Opinions, v. 83, p. 577. The opinion sustains the views we have expressed in the instant case.

was created by the Federal Government, nor because it was subsidized by it, nor because it was employed by the Federal Government, wholly or in part, unless it is really an agency or instrumentality for the exercise of the constitutional powers of the United States."

Imposition of the tax here does not in any sense interfere with the Government's business. On the contrary, the expressed social policies of the Government are sustained and promoted.

Finally, appellant urges that its employees are independent contractors. In its complaint it alleged they were employees. There was a declaration that "The employees, bath attendants and massage operators . . . are residents of the State of Arkansas, and . . . unemployment compensation for the year 1937 has been paid to the United States for their salaries, wages, and commissions." If it now be urged that language of the complaint was inadvertent, still we think the record establishes the relationship of master and servant, and the point must be overruled. The means and methods by which the work was done were subject to directions of appellants.

Action of the chancellor in sustaining the demurrer to appellant's complaint was correct, and the decree dismissing the complaint is affirmed.

[fol. 31] IN SUPREME COURT OF ARKANSAS,

[Title omitted]

PETITION FOR REHEARING—Filed April 12, 1939

Appellant prays that it be granted a rehearing in this cause and for reason says:

That the court has failed to take into consideration that the General Assembly of the State of Arkansas ceded jurisdiction to the Federal Government of the lands involved in the year 1903, subsequent to the decision of this court in the case of *ex parte Gaines* in the year of 1892, in determining the extent of the grant of the Federal Government to the State of Arkansas of the right to tax operations within the given area, and in failing to give effect to the restriction contained in the act of congress of

March 3, 1891 restricting the grant to the right to tax personal property only.

That the court failed to take into consideration that the fees of attendants on which a contribution was exacted were beyond the power of appellant to regulate and such enforced contributions would constitute the taking of private property without due process of law in violation of Amendment No. V of the Constitution of the United States.

Respectfully Submitted, (Signed) E. R. Parham,
Solicitor for Appellant.

[fol. 32] IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—May 23, 1939

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

5435.

BUCKSTAFF BATH HOUSE COMPANY,

v.

ED I. MCKINLEY, Commissioner of Labor, et al.

[fol. 33] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION OMITTING PORTIONS OF RECORD

It is stipulated and agreed by and between E. R. Parham and Terrell Marshall, counsel for appellant, and W. L. Pope, counsel for appellees, that the following exhibits shall be omitted from the record prepared by the Clerk of the Supreme Court of Arkansas on appeal to the Supreme Court of the United States, the same being cumulative and

not essential to show the errors complained of, set forth in appellant's Assignment of Errors:

(1) The lease of Superior Bath House, attached to plaintiff's Complaint, marked "Exhibit A-2", pages 17 to 25 of the Record.

(2) The lease of Quapaw Bath House, attached to plaintiff's Complaint, marked "Exhibit A-3", pages 26 to 36 of the Record.

(3) The regulations of the Department of the Interior for the Hot Springs National Park, attached to plaintiff's Complaint, marked "Exhibit B", page 37 of the Record.

(4) Copy of Opinion annexed to Statement of Jurisdiction, pages — to — of the Record.

Dated June 22, 1939.

Terrell Marshall, E. R. Parham, Counsel for Appellant. W. L. Pope, Counsel for Appellees.

[fols. 34-35] Clerk's Certificates to foregoing transcript omitted in printing.

[fol. 36] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed June 24, 1939

To the Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner, Buckstaff Bath House Company, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

This cause originated in the Pulaski Chancery Court, in which Court, by the complaint of the plaintiff, there was drawn in question the validity of Act No. 155 of the General Assembly of Arkansas for the year 1937, on the ground of its being repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, and that the decision in said Court was in favor of its validity.

The Supreme Court of the State of Arkansas is the highest Court in this State in which a decision in this suit can be had.

In said Court there was drawn in question the validity of said Act No. 155 of the General Assembly of Arkansas for 1937, on the ground that said statute was repugnant to the [fol. 37] laws of the United States in that appellant's operations were confined solely to the Hot Springs National Park Reservation, over which area the State of Arkansas had ceded jurisdiction to the United States and that said Act was repugnant to Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844) and Act of Congress, April 20, 1904 (33 Stat. 187) and that the decision of said Court was in favor of its validity.

Therefore, in accordance with paragraph 237 (a) of the Judicial Code, and in accordance with the rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force, when the Act of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors filed herewith, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of Arkansas; the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of said Supreme Court of the State of Arkansas may be examined and reversed, and also prays that a transcript of the record proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Arkansas, under his hand and seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that the bond for costs tendered by the petitioner be approved.

Terrell Marshall, E. R. Parham, Attorneys for Petitioner.

Dated: June 22, 1939.

[File endorsement omitted.]

[fol. 38] IN SUPREME COURT OF THE UNITED STATES
[Title omitted]

ORDER ALLOWING APPEAL—Filed June 24, 1939

The petition of Buckstaff Bath House Company, the appellant in the above entitled cause, for an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Arkansas, having been filed with the Clerk of the Supreme Court of Arkansas and presented therein, accompanied by Assignment of Errors and Statement of Jurisdiction, as provided by Rule 12 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby,

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment dated the 10th day of April, 1939, on which a petition for rehearing was entertained and overruled on the 23rd day of May, 1939, in the Supreme Court of the State of Arkansas, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Arkansas shall within forty days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of [fol. 39] said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties, or their counsel herein, in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that said appellant shall give a good and sufficient bond for costs in the sum of \$10,000; that it shall prosecute said appeal to effect and answer all costs if it fails to make good its plea.

Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas.

Dated: June 22, 1939.

[File endorsement omitted.] _____

[fol. 40] IN SUPREME COURT OF THE UNITED STATES
[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed.
June 24, 1939

Now comes the above plaintiff and files herewith its petition for allowance of appeal and says that there are errors

in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Arkansas erred in holding and deciding that Act No. 155 of the General Assembly of Arkansas for the year 1937 was applicable to the operations of plaintiff, which were confined solely to the Hot Springs National Park Reservation in Garland County, Arkansas. The validity of said Act, so far as it affected plaintiff's operations, was denied and drawn in question by the plaintiff on the ground of its being repugnant to Act of Congress, April 20, 1904, and of plaintiff's being exempt from the operation of said Act by reason of the cession by the State of Arkansas to the United States, by Act No. 30 of the General Assembly of Arkansas for 1903, of exclusive jurisdiction [fol. 41] over the Hot Springs National Park Reservation, reserving only the right to tax, as personal property, all structures and other property in private ownership in the Hot Springs National Park, which area was accepted by the United States under said Act of Congress of April 20, 1904 (33 Stat. 187, 16 U. S. C. A., paragraphs 372-383).

The said errors are more particularly set forth as follows: The Supreme Court of Arkansas erred in holding and deciding:

I

That Act No. 30 of the General Assembly of Arkansas for the year 1903 reserved to the State of Arkansas the right to tax the use of personal property within the Hot Springs National Park Reservation.

II

That the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844), and the Act of Congress of April 20, 1904 (33 Stat. 187, 16 U. S. C. A., paragraphs 372-383), by extending to the State of Arkansas the right to tax as personal property all structures and other property in private ownership in the Hot Springs National Park Reservation, impliedly extended the right to tax the use of such personal property.

III

That the State of Arkansas was not prohibited by Act of Congress of March 3, 1891, and Act of Congress of April

20, 1904, from levying and collecting a tax on the privilege of employment on the Hot Springs National Park Reservation.

IV

That by the agreement entered into between the United States of America and the State of Arkansas respecting [fol. 42] jurisdiction of the area embraced in the Hot Springs National Park as reflected by Acts of Congress of April 20, 1832 (c. 70, 4 Stat. at L. 505), December 16, 1878 (c. 5, 20 Stat. 258), March 3, 1891, and April 20, 1904, and Act No. 30 of the General Assembly of the State of Arkansas for 1903, the State of Arkansas was not limited to taxation, as personal property, of structures and personal property in said area.

For which errors the plaintiff, Buckstaff Bath House Company, prays that the said judgment of the Supreme Court of Arkansas dated the 10th day of April, 1939, be reversed and a judgment rendered in favor of the plaintiff, and for costs.

Terrell Marshall, E. R. Parham, Attorneys for Buckstaff Bath House Company.

[File endorsement omitted.]

[fols. 43-44] Bond on appeal for \$1,000, approved June 22, 1939, and filed June 24, 1939, omitted in printing.

[fol. 45] Citation, in usual form, showing service on W. L. Pope, filed June 24, 1939, omitted in printing.

[fol. 46] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 24, 1939

To Mr. C. R. Stevenson, Clerk of the Supreme Court of the State of Arkansas:

You will please prepare the record upon appeal of the above named appellant to the Supreme Court of the United

States, from the final judgment and decision of the Supreme Court of Arkansas, entered in said cause in favor of Ed I. McKinley, etc., and W. A. Booksberry, etc., appellees, and include in such record the following:

(1) The original Petition for Appeal to the Supreme Court of the United States, with the Assignment of Errors and Prayer for Reversal attached thereto.

(2) The Statement of Jurisdiction and appellees' reply thereto.

(3) The original Allowance of Appeal.

(4) A copy of the Bond and its approval.

(5) The original Citation with proof of service thereon.

(6) A copy of the opinion of the Supreme Court of the State of Arkansas in such cause.

(7) A copy of the minutes of said Court with reference to said cause.

(8) A copy of the Petition for Rehearing of the above named appellant.

[fol. 47] (9) A copy of the record on appeal to said State Supreme Court from the Pulaski Chancery Court, including the exhibits thereto annexed and admitted in said cause.

(10) Statement showing the filing of such Bond and the lodgment of copies of the Allowance of Appeal in your office.

(11) A return to such Allowance of Appeal and a statement of costs.

(12) Proof of service of Praecipe, Assignment of Errors, and Statement of Jurisdiction.

(13) Stipulation on omission of exhibits.

(14) A copy of this Praecipe.

Please certify the same to the said Supreme Court of the United States under your seal, in accordance with the rules of said Court and the laws of the United States upon such appeals.

Terrell Marshall, E. R. Parham, Attorneys for Appellant. Residence and Post Office Address, Little Rock, Arkansas.

Dated this the 22 day of June, 1939.

[File endorsement omitted.]

[fol. 48] Certificate of lodgment omitted in printing.

[fol. 49] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF APPELLANT'S POINTS ON WHICH IT INTENDS TO RELY, AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION—Filed July 14, 1939

Appellant adopts its Assignment of Errors as a statement of the points upon which it intends to rely, and states that the entire record, as filed, is necessary for a proper consideration of the case.

Terrell Marshall, — — —, Attorneys for Appellant.

I acknowledge service for the appellees of the foregoing statement of the appellant of the points on which it intends to rely, and of that part of the record which it considers necessary for the proper consideration of the case.

This the 11th day of July, 1939.

W. L. Pope, Attorney for Appellees.

[fol. 49½] [File endorsement omitted.]

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 9, 1939

Appeal from the Supreme Court of the State of Arkansas

Treating the appeal papers herein from the Supreme Court of the State of Arkansas as a petition for writ of certiorari;

On Consideration Whereof, it is ordered by this Court that the said petition for writ of certiorari be, and the same is hereby, granted.

Mr. Justice Butler took no part in the consideration and decision of this case.

[Endorsed on cover:] File No. 43,608. Arkansas Supreme Court. Term No. 201. Buckstaff Bath House Company, Appellant, vs. Ed I. McKinley, as Commissioner of the Department of Labor of the State of Arkansas, et al. Filed July 14, 1939. Term No. 201, O. T., 1939.